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No. 89-1508

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

COLORADO INTERSTATE GAS COMPANY,
Petitioner,

v.

NATURAL GAS PIPELINE COMPANY OF AMERICA and
NGPL-TRAILBLAZER, INC.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MOTION OF PUBLIC CITIZEN FOR LEAVE TO FILE BRIEF OUT OF TIME AS *AMICUS CURIAE* SUPPORTING PETITIONER AND BRIEF FOR PUBLIC CITIZEN AS *AMICUS CURIAE* SUPPORTING PETITIONER

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June 1990

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MOTION OF PUBLIC CITIZEN FOR LEAVE TO FILE BRIEF OUT OF TIME AS *AMICUS CURIAE* SUPPORTING PETITIONER

Public Citizen hereby seeks leave of the Court to file a brief as *amicus curiae* supporting petitioner's request that certiorari be granted in this case to review the first question presented. The proposed brief, which is printed with this motion, takes no position on the second question.

1. The first question presented here is whether orders of a federal agency which are silent on preemption issues may nonetheless preempt state law. The court of appeals

held that they could, not because the governing federal statute or agency order expressly preempts state laws, not because the state law conflicts with the agency's orders, but because, as the court of appeals put it, the agency orders need "room to breathe" (Pet. App. 12a).

2. Public Citizen is a non-profit, consumer organization located in the District of Columbia with 75,000 members from around the nation. The first question presented is of considerable interest and importance to Public Citizen, which has encountered this sort of preemption issue in other settings, as have Public Citizen attorneys in the course of their representation of other parties.

3. The brief which Public Citizen seeks leave to file will discuss situations outside the area of natural gas regulation where there is also confusion on the part of the lower courts and litigants about when and how a court may properly infer that an agency order preempts state law when the order does not address the preemption issue raised in the suit. This brief will also discuss the special problem posed if agency orders, as distinguished from agency rules, are given preemptive effect by implication. Thus, the brief will furnish the Court with information which has not previously been brought to its attention and which will explain why the first question presented is significant in other areas of the law.

4. Public Citizen acknowledges that under this Court's Rule 37, the filing deadline was 25 April 1990, but we ask the Court to accept this motion and brief at this time for the following reasons.

5. On 14 May 1990, this Court invited the Solicitor General to file a brief expressing the views of the United States. Public Citizen was not aware of this case until

shortly before that date, at which point it was already too late to file a brief. In light of the Court's order, however, respondents will not be prejudiced if Public Citizen's brief is accepted at this time. We are advised that the Solicitor General's brief will not be filed in time for the petition to be considered at any of the remaining conferences scheduled for this month. Thus, since the petition will not be considered until the Court's September conference at the earliest, respondents will have ample time to file a brief answering points made by the Solicitor General, as well as the points made by Public Citizen here.

6. Rex E. Lee, counsel of record for petitioner, has stated that petitioner has no objection to granting this motion. Joel I. Klein, counsel of record for respondents, has stated that respondents object to granting this motion as it is untimely.

For these reasons, Public Citizen respectfully requests that the motion be granted and that the Clerk be directed to accept the brief for filing.

Respectfully submitted,

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Attorneys for Public Citizen

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BRIEF FOR PUBLIC CITIZEN AS *AMICUS CURIAE* SUPPORTING PETITIONER

INTEREST OF *AMICUS CURIAE*

The interest of Public Citizen in this case is set forth in the accompanying motion for leave to file this brief.

REASONS FOR GRANTING THE WRIT

The petition for certiorari demonstrates that a conflict exists between the circuits on the precise preemption

point raised in Question One and that the court of appeals' analysis is inconsistent with this Court's preemption cases. Instead of repeating that discussion, we explain below why the problem raised by this case goes beyond the area of natural gas regulation and why the claim that orders issued by federal agencies implicitly preempt state laws should be rejected, except in those instances where the state law creates such a clear-cut and irreconcilable conflict with the federal rule that it is impossible to comply with both.

1. Under the doctrine of implied preemption, the Court has held, based on an analysis of such factors as the comprehensiveness of a federal regulatory statute, that Congress intended a federal statute to preempt state laws even when no preemptive effect is expressly stated in the statute. *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300 (1988); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). The Court has, however, hesitated to infer preemption on the basis of decisions issued by a federal *agency*, particularly when the decision in question is silent on preemption. Thus, in *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707 (1985), the Court rejected a claim that preemption could be implied on the basis of a comprehensive set of federal rules. As the Court observed, "because agencies normally address problems in a detailed manner and can speak through a variety of means, . . . we can expect that they will make their intentions clear if they intend for their regulations to be exclusive." *Id.* at 718. Thus, if "an agency does not speak to the question of pre-emption, we will pause before saying that the mere volume and complexity of its regulations indicate that the agency did in fact intend to

preempt." *Id.* The Court added that it would "seldom infer, solely from the comprehensiveness of federal regulations, an intent to pre-empt in its entirety a field related to health and safety." *Id.*

Since *Hillsborough County*, the Court has reaffirmed that if an agency intends to preempt state law, "one would expect to find the expression of this intent in these [federal] regulations." *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 583 (1987). And in *North Dakota v. United States*, 58 U.S.L.W. 4579 (U.S. 21 May 1990), the Court rejected a claim of preemption by regulation, noting that the rule in question did not "itself purport to pre-empt state laws." *Id.* at 4579 (plurality opinion). In those cases where preemption by regulation has been found, the Court has noted that the rule in question clearly expressed a preemptive intent. *See, e.g., Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 705 n.10 (1984); *Fidelity Fed. Sav. & Loan Ass'n v. De la Cuestra*, 458 U.S. 141, 154-59 (1982).

Requiring agencies to state explicitly any preemptive intent is an appropriate means of "prevent[ing] the diminution of the role Congress reserved to the States while at the same time preserving the federal role." *Northwest Central Pipeline Corp. v. State Corporation Comm'n of Kansas*, 109 S. Ct. 1262, 1272 (1989) (footnote omitted). Indeed, the importance of this requirement was articulated prior to *Hillsborough County* in a 1984 recommendation from the Administrative Conference of the United States, which urged agencies to be more sensitive to preemption concerns and to deal with them explicitly in the course of regulatory decision-making. 1 C.F.R. § 304.84-6 (1990). Executive Order 12612, adopted in 1987, also requires agencies to

consider federalism concerns in the course of their regulatory activities. 3 C.F.R. 252-56 (1988).

The agency decision-making process also counsels in favor of courts pausing before they hold that an agency implicitly meant to preempt state law. As *Hillsborough County* noted, agencies normally address issues in more detail than does Congress, 471 U.S. at 717, and it is easier for an agency to articulate its preemptive intent in particular rulings than it is for Congress to address preemption concerns when enacting a broad regulatory statute which does not expressly purport to occupy the field. And if in a given case, an agency does intend for its order to have preemptive effect, but a court later holds that this intent was not adequately expressed, the agency has considerable flexibility under the Administrative Procedure Act to issue a new order clarifying its intent.

Despite these considerations, the decision below indicates that the principles of *Hillsborough County* have not been uniformly followed. In this case, the Tenth Circuit noted that orders of the Federal Energy Regulatory Commission clearly preempted petitioner's simple breach of contract claim, and petitioner does not challenge that ruling here. However, the court of appeals went on to the find that petitioner's claim for breach of the duty to perform in good faith was also preempted, even though the Commission did not expressly address that claim in its order. The court reasoned that the FERC orders needed "room to breathe" (Pet. App. 12a), which meant that state law claims *beyond* those identified in the orders were also preempted. This is hardly an example of a court "pausing" before finding preemption, as *Hillsborough County* requires.

Unfortunately, this case is not an isolated instance, and there are examples outside the realm of natural gas regulation where courts and litigants have argued that agency orders may preempt state claims even when the orders express no preemptive intent.

One current example involves deceptive advertising, an area where both the states and the federal government have authority to regulate and where it has been held that the federal government's authority co-exists quite comfortably with state laws. *See American Financial Services v. FTC*, 767 F.2d 957, 989-91 (D.C. Cir. 1985). In *State of Texas v. Quaker Oats Co.*, No. CA3-89-2350-R (N.D. Tex.), the state sought to use its deceptive practices statute against certain health claims made about Quaker oatmeal. Prior to that time, the FTC staff had denied a citizen petition asking the Commission to file a complaint against Quaker based on the same advertising. Quaker argued that this ruling by the FTC *staff* preempts Texas law, even though only decisions of the full *Commission* can be accorded preemptive effect, *see Kathrine Gibbs School (Inc.) v. FTC*, 612 F.2d 658, 667 (2d Cir. 1979), and even though the FTC staff indicated in letters denying the citizen petition that its ruling was a discretionary decision not to prosecute, based on the facts available at that time. *See Heckler v. Chaney*, 470 U.S. 821 (1985). Although the FTC staff letters denied having *any* legal effect—much less a preemptive effect—the Magistrate recommended denial of Texas' motion for partial summary judgment on this point, agreeing with Quaker that material facts were in

dispute about whether the FTC staff letters had preempted the state's claim.[1]

In a different context, a federal appeals court recently ruled that a consent decree entered in an agency adjudicatory proceeding may preempt state laws even if the decree is silent on preemption. In *General Motors Corp. v. Abrams*, 897 F.2d 34 (2d Cir. 1990), the company sought to enjoin various provisions of New York's "lemon law" on the ground that they were preempted by a Federal Trade Commission consent decree affecting arbitration of certain claims between General Motors and its customers, even though the decree did not purport to preempt state law claims. The court determined that, as a general matter, consent orders could be accorded preemptive effect even if they say nothing about preemption, although the court found that, on the facts presented there, no preemptive intent could be imputed to the FTC, nor could preemption be found on the basis of any conflict between the obligations imposed by the consent decree and the state statute. *Id.* at 40-44.

We agree with the result in *General Motors*, but its analysis is troubling insofar as it employed the "field preemption" analysis which *Hillsborough County* counsels against using in regulatory preemption contexts. We submit that, in the absence of any expressly stated preemptive intent on the agency's part, the better analysis (and the one more consistent with *Hillsborough County*) would be to focus on whether a state law

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[1] The FTC staff letters to counsel for Quaker and to counsel for the consumer group filing the petition appear as an appendix to this brief, along with the Magistrate's opinion.

actually conflicts with the agency order, such that it is impossible to comply with both.

This Court has long distinguished between situations where there is an actual conflict between state and federal mandates, such that compliance with both is impossible, *see Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963), and situations where state law is said to frustrate the purpose of a federal law or regulation, *see Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). *See generally Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984). In the latter situation, the tension between state and federal requirements is generally less pronounced than in the former, where compliance with both regimes may be physically impossible. Accordingly, a court should hesitate before inferring preemptive intent in the latter situation, particularly if it is dealing with a federal regulation, as opposed to congressional enactments. As *Hillsborough County* noted, agencies can articulate their preemptive intent with greater ease and precision than can Congress, and thus "frustration of purposes" analysis is best left to cases where *Congress's* preemptive intent is at issue, rather than cases where a court is trying to divine an *agency's* preemptive intent. *See* 471 U.S. at 721 and the discussion at pp. 2-4, *supra*.

Nonetheless, as the decision below demonstrates, there seems to be a ready willingness by litigants to argue, and lower courts to find, that preemption exists, based on a perception that an agency's regulatory goals will be thwarted by state law, even though the agency expresses no view on the subject and even though the party subject to the twin regulatory strictures can comply with both. Several recent cases involving federal auto safety standards further illustrate the point. In these

cases, the victims of automobile accidents asserted that manufacturers were negligent under state law on the ground that the vehicles did not contain certain passive restraints. In response, the manufacturers argued that these claims were preempted by the federal statute and by a federal standard issued under that law which gave manufacturers a choice when it came to installing passive restraints technology. The courts addressing these cases all found the claims preempted, with some courts accepting the statutory preemption claim, *Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. 1989), *cert. denied*, 110 S. Ct. 1781 (1990); *Kitts v. General Motors Corp.*, 875 F.2d 787 (10th Cir. 1989), *cert. denied*, 110 S. Ct. 1781 (1990), and others accepting the regulatory preemption claim, *Taylor v. General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989), *cert. denied*, 110 S. Ct. 1781 (1990).

When the cases reached this Court, the Solicitor General was invited to file a brief in one of them, and his brief sharply disagreed with the statutory preemption claim, but argued that there was a valid claim of regulatory preemption in at least some cases. In his view, the federal standard, which says nothing about preemption, evinces a preference for giving manufacturers flexibility in choosing compliance options, which implicitly preempts state laws that would mandate the use of one technology over another and that therefore "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of [the agency]." Brief for the United States as *Amicus Curiae* at 14, *Wood v. General Motors Corp.*, No. 89-46 (O.T. 1989), *quoting Hines v. Davidowitz*, *supra*, 312 U.S. at 67. This same basic analysis has subsequently been adopted in another

circuit, *see Pokorny v. Ford Motor Co.*, 902 F.2d 1116 (3d Cir. 1990).

We have grave difficulty squaring this approach with *Hillsborough County* because in these passive restraints cases, there was no irreconcilable conflict between the state and federal requirements and because, if the agency there really did want its preference for flexibility to override state laws, it could have stated that intent with relative ease in the rule or an amendment to the rule. In any event, whatever reasons the Court may have had for denying certiorari in those cases,[2] they buttress our basic point that regulatory preemption claims are cropping up in a variety of contexts and that there is a need for the Court to clarify the approach which agencies and reviewing courts must following in considering preemption claims in this context.

2. *Hillsborough County* and other regulatory preemption cases decided by this Court (cited at pp. 2-3, *supra*) all involved orders adopted by rulemaking, whereas the FERC orders in this case include some adopted in adjudications as well as by rulemaking. In our view, preemption claims based on adjudicatory orders are even more suspect than preemption claims based on federal regulations, and they should, at the very least, receive the closest scrutiny before finding preemption can be implied from the text of the order.

Unlike rulemaking proceedings, which allow members of the public to raise preemption concerns of which they

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[2] The Solicitor General's brief recommended (at 16-20) that certiorari be denied because there was not an intolerable conflict between the lower courts and because there were certain factual issues which no lower court had addressed.

may be aware at the moment, adjudications generally involve only a limited number of issues and parties. As a result, the orders which emerge from these proceedings are based strictly on the limited factual circumstances presented to the agency. Those facts may have little or no application to absent parties, who may have received no notice about the case or who, if they did know, may have seen no need to intervene (let alone enjoyed a right to do so) because they did not believe that their interests were affected.

A lack of notice and an opportunity to comment would clearly raise due process problems in those cases where an agency order *explicitly* stated an intent to preempt state law. *See Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 261-62 (1987); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-14 (1985); *Martin v. Wilks*, 109 S. Ct. 2180 (1989). Those problems would be exacerbated if preemption could be established not on the basis of any explicit agency statement, but on a court's after-the-fact analysis of what an agency *must have* intended to preempt when it drafted its order.

When viewed in this light, the court of appeals' "room to breathe" analysis here is particularly troublesome in the context of agency orders. *General Motors v. Abrams* shows that this case is not an isolated example, since the consent decree there said nothing about preemption, yet the court was urged to decide whether that decree implicitly preempted statutory provisions which were not enacted until several years after the decree had been entered. 897 F.2d at 36-37. As the discussion in Point 1 demonstrated, similar preemption issues will continue to arise in a variety of contexts, absent clarification from the

Court on the question of when and how agencies may preempt state law by regulatory action. Regardless of how one may view this issue on the merits, review should be granted because this case would allow the Court to clarify how the *Hillsborough County* analysis applies to claims of implied preemption based on adjudicatory orders.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Public Citizen

June 1990

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

June 19, 1989

R. Thomas Howell, Jr., Esq.
Vice President and General Corporate Counsel
The Quaker Oats Company
Quaker Tower
321 N. Clark Street
Chicago, Illinois 60610

Re: File No. 882 3173

Dear Mr. Howell:

The Commission has conducted an investigation involving your possible violation of the Federal Trade Commission Act with respect to your advertising of Quaker Oats.

Upon further review, we have determined that no further action is warranted by the Commission at this time. Accordingly, the investigation has been closed. This action is not to be construed as a determination by the Commission that a violation may not have occurred, just as the pendency of an investigation should not be construed as a determination that a violation has occurred. The Commission reserves the right to take such further action as the public interest may require.

Sincerely,

/s/ William MacLeod
William MacLeod
Director
Bureau of Consumer
Protection

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C.

June 16, 1989

Mr. Bruce Silverglade
Director of Legal Affairs
Center for Science in the Public Interest
1501 16th Street, N.W.
Washington, D.C. 20036

Dear Mr. Silverglade:

This letter is in reference to the CSPI petition regarding advertising of The Quaker Oats Company. You contend that certain of Quaker's print ads mislead consumers by exaggerating the contributions that hot oat cereals can make in preventing heart disease.

You describe these ads as emphasizing that "high blood cholesterol levels are a major risk factor in coronary heart disease," and that "40,000,000 Americans have high cholesterol." Further, as you note, the ads state that a diet that is low in fat, saturated fat, and cholesterol, and high in complex carbohydrates and soluble fiber, can help the reader "eat your way back out of it." These statements you find unobjectionable.

However, you do object to the following language in certain of Quaker's ads:

In recent clinical studies, where Quaker Oats were a daily part of a low-fat, low-cholesterol diet, total serum cholesterol levels dropped on average almost 10%. Other medical studies show such a drop could reduce your risk of heart attack by nearly 20%.

Many experts believe it's the soluble fiber in oats that does it. And, scientists are finding that *oats are one of the best sources of soluble fiber you can get!*

With respect to the state of the scientific knowledge on the relationship between diet, serum cholesterol and heart disease, you state that Quaker in its ads is correct that diets low in fat, saturated fat, and cholesterol can reduce blood cholesterol levels. As you note, authorities such as the National Institutes of Health, the U.S. Department of Agriculture, and the American Heart Association specifically recommend such diets.

The evidence on the relationship between diet and cholesterol comes from a number of studies which you cite in your petition. These studies have found that oat consumption alone and oat consumption combined with low-fat diets can reduce serum cholesterol. In one study, participants experienced an average reduction of 8.7% in serum cholesterol levels from a low-fat diet that included oats. Another study found that a low-fat diet with oatmeal reduced serum cholesterol by 10% in a subgroup of test subjects whose cholesterol level was 198 or greater. (The average level in the U.S. is estimated at 210 to 215). Low density lipoproteins, which are regarded

as the major CHD risk factor in cholesterol, dropped by 15% in the latter study.

You agree that a 10% reduction in blood cholesterol may well reduce heart risks by 20% because "strong scientific evidence indicates that every 1% reduction in the blood cholesterol level of a person who has not suffered a heart attack reduces that person's risk of heart attack by 2%." Thus, you state that if the advertised product could reduce blood cholesterol levels by nearly 10%, it would not be misleading to claim that consumption of this product would reduce heart attack risks by nearly 20%.

However, you contend that the ads lead the reader to conclude that consumption of Quaker Oats alone can reduce serum cholesterol by nearly 10%, and heart attack risk by nearly 20%. You believe that this claim is deceptive in that the studies referred to by Quaker do not support the claim that consumption of oats will alone have this effect. It is therefore our understanding that the primary concern you have with these ads is that consumers would interpret them to mean that the "almost 10%" reduction in serum cholesterol levels mentioned in the ads is due to consumption of Quaker Oats alone, and not due to a low-fat diet which includes Quaker Oats.[1]

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[1] Your petition also questions the use of "almost 10% to describe cholesterol reductions obtained in the first Van Horn study, where the reduction averaged 8.7% over all those who combined dieting with oat consumption. It seems highly unlikely that such a representation deceives consumers, especially in view of the second Van Horn study, which found a

continued

As you note, the factual issue at the center of a legal inquiry under the FTC Act is the net impression that an advertisement conveys to consumers. Your petition contends that the ads imply it is Quaker Oats alone that has been shown to cause the reduction in blood cholesterol level, notwithstanding language in the ad emphasizing the benefits of a low-fat, low-cholesterol diet as a whole. Staff conducted an inquiry to ascertain whether the advertisement was likely to convey the impression you described.

Our investigation indicates that consumers do not take the implied message that Quaker Oats alone caused the claimed reduction in serum cholesterol level. To the contrary, we have concluded that consumers who view the advertising would attribute the reduction to a low-fat diet including Quaker Oats. This conclusion is based on the actual reactions of consumers, as well as our analysis of the ads themselves. Therefore, we do not believe that the evidence would support the conclusions in your petition.

We have communicated our conclusion to Quaker and have been advised that they nonetheless plan to clarify the ads that prompted your petition. Thus, your effort should help prevent questions like these from arising in the first instance. We appreciate your bringing the matter to our attention. And of course, the views we express are

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10.0% cholesterol reduction and a 15% LDL reduction in subjects with average and above-average cholesterol levels.

those of the Bureau of Consumer Protection, not necessarily those of the Commission or any individual Commissioner.

Sincerely yours,

/s/ William C. MacLeod
William C. MacLeod
Director
Bureau of
Consumer Protection

cc: R. Thomas Howell, Jr., Esq.
The Quaker Oats Company

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

STATE OF TEXAS and ROBERT BERNSTEIN	)	
VS.	)	
THE QUAKER OATS COMPANY	)	CIVIL NO. CA 3-89-2350-R
VS.	)	
JIM MATTOX and ROBERT BERNSTEIN	)	

RECOMMENDATION

Under authority of 28 U.S.C. § 636(b) and the Local Rules of this Court, the motion by the State of Texas and Robert Bernstein for judgment on the pleadings or partial summary, filed March 6, 1990, was referred to the magistrate. A hearing was held on April 11, 1990 and counsel for all parties were present. And having reviewed the said motion, as well as the response thereto, including briefs submitted by the parties in support of their respective positions, and having heard the arguments of counsel, I am of the opinion that the motion to dismiss and for partial summary judgment should be denied.

The pleadings by Quaker Oats Company have asserted several substantial constitutional issues, including claims that the actions by the state parties have violated Quaker Oats' First Amendment rights, have placed an intolerable burden upon interstate commerce, and violate the Compact Clause and Equal Protection Clause of the Constitution. Defendant Quaker Oats further argues that the actions by the State and its agents are preempted by actions and orders taken and entered by the United States government through the FTC, the FDA and the FCC. There are numerous fact issues to be determined in order to resolve Quaker Oats' claims. For instance, there is a substantial controversy between the parties as to whether oatmeal is a drug, as the state alleges that it is in the context of this case, or whether it is merely a food product. There are also fact issues which must be resolved in order to apply the required balancing test to determine whether the state regulations, about which Quaker complains, place an intolerable burden on interstate commerce. Other fact issues are questions as to what the FTC, the FDA and the FCC did or did not do, all of which have a bearing upon the preemption issue presented by Quaker in its pleadings.

RECOMMENDATION

I recommend that the motion to dismiss for partial summary judgment be denied.

SIGNED this 12th day of April, 1990.

/s/ John B. Tolle
UNITED STATES MAGISTRATE